

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 5, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2012AP1124-CR**

**Cir. Ct. No. 2009CF4923**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTOINE LAMONT MASSEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Antoine Lamont Massey appeals from a judgment entered upon a jury's verdict convicting him of one count of possession of cocaine with intent to deliver, between five and fifteen grams, as a repeater, and from an order denying his postconviction motion. On appeal, Massey challenges the

search that led to the discovery of the cocaine, arguing that the trial court erred in concluding that Ebony Lewis had actual or apparent authority to consent to the search, that even if she did, her consent was not given voluntarily, and that Palestine Boyce, the leaseholder of the home, invalidated Lewis's consent.<sup>1</sup> For the reasons which follow, we affirm.

## BACKGROUND

¶2 In November 2009, the State filed a criminal complaint against Massey, alleging possession of cocaine with intent to deliver, in an amount more than five grams but less than fifteen grams, as a repeater, and possession of a firearm by a felon, also as a repeater. Police discovered the cocaine and the gun in a private residence while executing a parole warrant against Massey. Massey filed a motion to suppress the cocaine and the gun, arguing that Lewis, who did not live at the home, did not have the authority to consent to the warrantless search that uncovered the contraband.

¶3 At the suppression hearing, Milwaukee Police Officer Michael Lopez, Ebony Lewis, Palestine Boyce, and Ethel Massey-Tate all testified. We recap that testimony relevant to Massey's appeal here.

¶4 Officer Lopez testified that he and other officers went to the residence in question to arrest Massey on a probation-violation warrant. Lewis

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<sup>1</sup> The Honorable Glenn H. Yamahiro entered the judgment of conviction and the order denying Massey's postconviction motion. The Honorable Patricia D. McMahon presided over the suppression hearing and entered the order denying that motion.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

answered the door. Officer Lopez testified that he and his partner identified themselves and asked Lewis who was in the home. Lewis told them there was no one else in the residence, and denied knowing Massey when police showed her his picture. Lewis went to the rear of the apartment, came back, and asked if they had a search warrant. Because another officer spotted Massey in the kitchen area of the residence, the police ordered Lewis out of the way and entered the residence to apprehend Massey. They eventually located Massey in the basement of the residence, hiding behind stacked boxes. The police took Massey into custody, detaining him in the police wagon outside.

¶5 After the police found Massey hiding in the basement, Officer Lopez spoke to Lewis in a front bedroom of the house. She was not handcuffed, and Officer Lopez testified that he did not have his gun drawn at the time they spoke. Lewis told Officer Lopez that Boyce, her mother and the home's leaseholder, was currently in jail and that Boyce had left Lewis "in charge of the residence." According to Officer Lopez, Lewis told him that she was paying the rent and was in charge of her younger sisters who lived at the home. Officer Lopez testified that he interpreted Lewis's statements to mean that she was in charge of the entire residence.

¶6 Lewis identified the back bedroom as Boyce's, and told Officer Lopez that she slept in the house approximately three times a week, in the back bedroom. She also told Officer Lopez that Massey occasionally slept at the residence.

¶7 Officer Lopez then obtained Lewis's consent to search the back bedroom. After receiving Lewis's consent, Officer Lopez went to his car, got a digital recorder, returned to the house, and obtained Lewis's consent again, this

time recording it. The State played the recording at the hearing.<sup>2</sup> Police found crack cocaine, marijuana, and a gun in the back bedroom.

¶8 Lewis testified that she did not live at the residence, but that Boyce had put her in charge of the home while Boyce was in jail. Lewis testified that this meant that she was paying the bills for the home from Boyce's bank account and supervising her sisters who lived in the home. Lewis said that she checked on her sisters daily, and slept at the house three nights a week in the back bedroom. She testified that she did not have keys to the house, and did not believe she had any authority over the back bedroom.

¶9 Lewis further testified that she believed that the police "kind of tricked" her into consenting, by telling her that if she did not consent they would get a search warrant and board up the house. She also said police told her she could get into trouble for lying. Lewis testified that she consented because she "thought that is what I had to do" but admitted that Officer Lopez never threatened her beyond telling her that she could get into trouble for lying, that he did not have his gun drawn, and that she was not handcuffed.

¶10 Boyce testified that she leased the home in question and was in jail at the time of the search. She stated that Lewis was in charge of paying her bills and checking on her daughters in the home while Boyce was incarcerated, and that she expected Lewis to sometimes sleep at the house. Boyce said that she knew that Lewis would sleep in the back bedroom sometimes, but that she did not give Lewis authority to allow a search of the room.

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<sup>2</sup> Neither the recording nor a transcript of the recording was included in the record on appeal.

¶11 Boyce further testified that she called her home the day of the search and discovered that the police were searching her house. After the call was disconnected, she called Massey-Tate and asked her to go to the home to tell police that she did not consent to the search.

¶12 Massey-Tate also testified that Boyce called her and told her to go to the house to tell police that Boyce did not consent to the search. Massey-Tate testified that she spoke to a heavysset black police officer on the porch who told her that the police already had permission to search.

¶13 After hearing all of the testimony and argument from counsel, the trial court denied Massey's motion to suppress. Finding Officer Lopez to be a more credible witness than Lewis, the trial court concluded that Lewis had actual authority to consent to the search, and that she voluntarily gave such consent. The trial court found the recording of Lewis's second consent telling:

You can hear in the recording the tone of her voice. She doesn't sound stressed. She doesn't sound angry. She doesn't sound upset. She's matter of fact answering the questions posed by Officer Lopez and giving responses and confirming the responses she had already given, so I cannot conclude that she was only giving consent because there were threats or promises.

¶14 As to the defense's argument that Boyce's phone call from jail overrode Lewis's consent, the trial court noted that the "testimony on that was very confusing." The trial court was unconvinced the call even occurred, but determined that even if Boyce had called the house, the evidence did not clearly demonstrate that Officer Lopez heard someone on a phone trying to revoke consent and that the timing of the call relative to the search was unclear.

¶15 The case proceeded to trial where a jury found Massey guilty of the drug charge and not guilty of the possession of a firearm by a felon charge. Massey filed a postconviction motion, asking the court to modify his sentence. The trial court denied the motion, and Massey appeals.<sup>3</sup>

## DISCUSSION

¶16 Massey’s sole complaint on appeal is that the trial court erred in denying his motion to suppress. Specifically, Massey argues that: (1) Lewis did not have apparent or actual authority to consent to the search; (2) even if she did, her consent was not voluntary; and (3) Boyce unequivocally withdrew any valid consent given by Lewis. We disagree.

¶17 When reviewing a trial court’s order refusing to suppress evidence, we uphold its findings of historical fact unless they are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995); *see also* WIS. STAT. § 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Whether a search or seizure violates the Fourth Amendment, however, is a question of law that we review *de novo*. *See State v. Richardson*, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶18 “‘The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

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<sup>3</sup> On appeal, Massey does not raise any of the sentencing issues he addresses in his postconviction motion. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (“[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.”).

searches and seizures.’” *State v. Lathan*, 2011 WI App 104, ¶10, 335 Wis. 2d 234, 801 N.W.2d 772 (citation omitted). A warrant is required to justify the search of an area where a person has a constitutionally-guaranteed expectation of privacy unless the State can show by clear and convincing evidence that an exception to this requirement applies. *State v. Guard*, 2012 WI App 8, ¶23, 338 Wis. 2d 385, 808 N.W.2d 718.

¶19 Warrantless searches are *per se* unreasonable and are subject to only a few limited exceptions. See *Katz v. United States*, 389 U.S. 347, 357 (1967); *State v. Matejka*, 2001 WI 5, ¶17, 241 Wis. 2d 52, 621 N.W.2d 891. A search conducted with the consent of a person with actual or apparent authority to do so is one exception. See *United States v. Matlock*, 415 U.S. 164, 171 (1974); *State v. Tomlinson*, 2002 WI 91, ¶25, 254 Wis. 2d 502, 648 N.W.2d 367; *State v. Kieffer*, 217 Wis. 2d 531, 547-48, 577 N.W.2d 352 (1998). “Consent searches are ‘a constitutionally permissible and wholly legitimate aspect of effective police activity.’” *State v. St. Martin*, 2011 WI 44, ¶19, 334 Wis. 2d 290, 800 N.W.2d 858 (citation omitted).

**I. Lewis had actual and apparent authority to consent to a search of the back bedroom.**

¶20 Massey first argues that Lewis, who did not live at the premises, did not have actual or apparent authority to consent to a search of the back bedroom where the police discovered the cocaine. We disagree.

¶21 A third party may give consent for a search “if he or she possesses ‘common authority over or other sufficient relationship to the premises or effects sought to be inspected.’” *State v. Sobczak*, 2012 WI App 6, ¶7, 338 Wis. 2d 410, 808 N.W.2d 730 (WI App 2011), *petition for cert. granted*, 2012 WI 77, 342

Wis. 2d 155, 816 N.W.2d 321 (June 13, 2012) (citation omitted). “‘Common authority’ is defined as mutual use of the property and joint access or control for most purposes.” *Id.* The State must establish “the sufficiency of the consenting individual’s relationship to the premises to be searched.” *Kieffer*, 217 Wis. 2d at 542. Courts must consider the totality of the circumstances when determining whether the consenting party has authority to consent. *Tomlinson*, 254 Wis. 2d 502, ¶31.

¶22 In addition, law enforcement may also conduct a search when receiving consent from a third party who has “apparent authority” to consent. *Illinois v. Rodriguez*, 497 U.S. 177, 186-87 (1990); *Kieffer*, 217 Wis. 2d at 548. That is, the information available to law enforcement must justify a reasonable belief that the person has the authority to consent. *Rodriguez*, 497 U.S. at 186; *Kieffer*, 217 Wis. 2d at 548. This is an objective test. *Rodriguez*, 497 U.S. at 188; *Kieffer*, 217 Wis. 2d at 548. Officers may not always take this consent at face value and must consider the surrounding circumstances. *Rodriguez*, 497 U.S. at 188; *Kieffer*, 217 Wis. 2d at 549.

¶23 The evidence presented by the State during the suppression hearing supports the trial court’s decision that Lewis had actual and apparent authority over the entire house, including the back bedroom. Lewis was the adult daughter of Boyce, the house’s leaseholder, who was left in charge of the house while Boyce was incarcerated. Boyce entrusted Lewis to pay the bills, and to watch her younger sisters who lived in the home. As part of her duties, Boyce expected Lewis to check in daily and to occasionally sleep in the back bedroom. In other words, Boyce had given Lewis “run of the apartment” while she was there. See *United States v. Garcia*, 690 F.3d 860, 862-63 (7th Cir. 2012) (neighbor who had “run of the apartment” to watch the defendant’s children while he worked had



actual authority to consent to search of the home); *see also Sobczak*, 338 Wis. 2d 410, ¶12 (houseguest who is given “the run of the house” may give actual consent) (citation omitted).

¶24 We disagree with Massey’s contention that Lewis could not give actual consent because she did not have a key to the house. When Lewis was in the home, as Boyce expected her to be on a daily basis and as she was at the time police asked to search the home, Lewis had “the run of the house.” She had access to all of the rooms, including the back bedroom where Boyce knew Lewis occasionally slept. As such, she had actual authority to consent to a search of the back bedroom.

¶25 Furthermore, even if Lewis did not have actual authority to consent to the search, Officer Lopez reasonably believed she had such authority. Officer Lopez testified, and the trial court found his testimony credible, that Lewis told him that Boyce had left her in charge, that she was paying the rent, that she was in charge of her sisters who lived at the house, and that she occasionally slept in the back bedroom. A reasonable person hearing this information would believe that Lewis had the actual authority to consent to a search of the entire house, including the back bedroom.

¶26 We also reject Massey’s contention that Lewis did not have the authority to consent to a search of the back bedroom because he had a greater privacy interest in the bedroom than she did. Even if true, and we do not conclude that it is, his complaint is irrelevant. As the State correctly points out, even if Massey had a privacy interest in the back bedroom, at the time the police asked Lewis for permission to search, Massey was under arrest in a police car and was not present to object to the search. His interest in the bedroom is of no matter.

*See St. Martin*, 334 Wis. 2d 290, ¶¶3-7, 27 (while co-tenant can prevent search when other tenant has given consent for it, the co-tenant must be physically present to object; co-tenant in custody in police car is not considered present).

## II. Lewis's consent was voluntary.

¶27 Next, Massey contends that Lewis's consent was not voluntary because she was scared of the police. Massey relies on Lewis's testimony that police, upon first entering the home, had their guns drawn and ordered her to get out of the way. We disagree.

¶28 Massey accurately argues that consent to search must be given voluntarily, without any duress or coercion, either express or implied. *See State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). The State has the burden to prove, by clear and convincing evidence, that consent was voluntary. *State v. Bermudez*, 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998). Whether consent is voluntary depends on the circumstances, including both the events leading to the consent and the characteristics of the person giving the consent. *Id.*

¶29 Although no single criterion is controlling, we may consider: (1) whether the police used any deception, misrepresentation or trickery; (2) whether the police threatened or intimidated the person; (3) the conditions at the time the request to search was made; (4) the person's response to the request; (5) the individual's characteristics including age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the person that he or she could refuse to consent to a search. *Id.* at 349.

¶30 We agree with the trial court that Lewis’s consent was given voluntarily. At the time Lewis gave her consent, she was not handcuffed and police did not have their guns drawn. She was in her mother’s house, a place she likely felt safe. While Massey makes much of Lewis’s testimony that she felt “scared” and “tricked,” Massey has pointed to no evidence demonstrating that Lewis had reason to feel scared or tricked at the time she consented to the search. Nothing in the record indicates that Officer Lopez lied to Lewis. While Officer Lopez may have told Lewis that she could be arrested for lying to him and that police would get a warrant if she denied consent, nothing indicates that either assertion was false. *See State v. Kiekhefer*, 212 Wis. 2d 460, 473, 569 N.W.2d 316 (Ct. App. 1997) (police may not threaten to obtain warrant when there are no grounds for one, but when expressed intention to obtain warrant is genuine, it does not vitiate consent). Moreover, Massey’s reliance on Lewis’s testimony that police entered the residence with their guns drawn and ordered her out of the way, intimidating her, is misplaced. The trial court explicitly found that Officer Lopez was more credible than Lewis. And if even if the police did make a show of force when they entered the home to arrest Massey, there was no such show of force later when Lewis consented to the search.

¶31 Finally, the trial court found that Lewis did not sound upset or stressed in the recording of her second consent. Because Massey did not include the recording in the record, we must assume that the trial court’s description of the recording is correct. *See State v. Provo*, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272 (“It is the appellant’s responsibility to ensure completion of the appellate record and when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports

the trial court's ruling.") (citation and internal quotation marks omitted). As such, we conclude Lewis's consent was voluntary.

**III. Massey's claim that Boyce's phone call invalidated Lewis's otherwise valid consent is undeveloped.**

¶32 In a last ditch effort to invalidate Lewis's consent, Massey argues that the trial court improperly concluded that Boyce's phone call did not withdraw Lewis's consent. However, Massey's argument is entirely undeveloped. He cites to no authority to support his proposition that a tenant who is not physically present can, by phone, invalidate another's lawful consent. Nor does he attempt to challenge the trial court's findings that the evidence surrounding the phone call was unclear and that there was no evidence demonstrating that the phone call was heard by police in a timely manner. We decline to address such undeveloped and unsupported arguments. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (We may disregard issues that are inadequately briefed.).

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

